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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/458,862	12/10/1999	ALLISON HUBEL	600.451US1	9374
21186	7590	12/10/2003	EXAMINER PESELEV, ELLI	
SCHWEGMAN, LUNDBERG, WOESSNER & KLUTH, P.A. P.O. BOX 2938 MINNEAPOLIS, MN 55402			ART UNIT 1623	PAPER NUMBER

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Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 30

Application Number: 09/458,862
Filing Date: December 10, 1999
Appellant(s): HUBEL, ALLISON

Janet E. Embretson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 29, 2003.

A statement identifying the real party in interest is contained in the brief.

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A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

The statement of the status of the claims contained in the brief is correct.

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

The summary of invention contained in the brief is correct.

The appellant's statement of the issues in the brief is substantially correct. The changes are as follows: upon further consideration the rejection of all the claims under 35 USC 112, second paragraph and under 35 USC 102 is hereby withdrawn

35 USC
conceded?

Appellant's brief includes a statement that claims a): 1-8, 11, 12, 14, 16, 17, 19-22, 24, 31, 33-36, 53 and 55, b): 26-28, 30, 32, 49-52 and 58, c): 37-48, IV: 54 and 56, d): 57 and e): 59-60 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

The copy of the appealed claims contained in the Appendix to the brief is correct.

WO 97/35472

OLIVER et al

10-1997

Claims 1-8, 11-12, 14, 16, 17, 19-22, 24, 26-28, 30-44 and 47-52 rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for arabinogalactan, does not reasonably provide enablement for a biological or functional equivalent thereof. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the invention commensurate in scope with these claims. The terminology "biological or

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functional equivalent thereof" encompasses derivatives of arabinogalactan in addition to compounds which are structurally unrelated to arabinogalactan but which possess a biological function which is equivalent to arabinogalactan. On page 4, lines 9-16 of the specification it is stated that "arabinogalactan, a biological or a functional equivalent thereof includes naturally occurring or synthetic arabinogalactan, portions of arabinogalactan, such as degradation products" as well as chemically or biochemically modified arabinogalactan or portions thereof. However, note that the term "includes" means that the definition of a biological or functional equivalent of arabinogalactan is not limited to those set forth on page 4 of the specification but encompasses compounds which are structurally unrelated to arabinogalactan. The appellant has failed to provide any teaching or guidance on how to obtain compounds which are structurally distinct from arabinogalactan but which are biological or functional equivalent thereof and it would take an undue amount of experimentation by a person having ordinary skill in the art at the time the instant invention was made to determine which specific compounds are biological or functional equivalents of arabinogalactan.

Claims 1-8, 11, 12, 14, 16, 17, 19-22, 24, 26-28, 30-44 and 47-58 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 97/35472.

The WO patent discloses a cryopreservation medium comprising a balanced salt solution, suitable for a specific cell type (page 6, lines 25-26), arabinogalactan present in the range of between 5 and 70%, preferably between 14 and 20% (wt./vol.) (page 7, lines 4-10). The WO patent also teaches on page 7 that the presence of DMSO is optional and that the cryopreservation medium can include glycerol. Note also that on

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page 9, lines 12, the WO patent discloses that cells may be frozen in arabinogalactan alone. On page 9, lines 25-31 and page 10, lines 1-10, the WO patent discloses that any of a wide range of somatic cells can be cryopreserved in a medium containing arabinogalactan, that the term "somatic cell" refers to any cell that is not sperm or oocyte and includes blood cells. Although, lymphocytes are not specifically disclosed by the WO patent, the term "somatic cells" encompasses lymphocytes and a person having ordinary skill in the art at the time the instant invention was made would have been motivated to use the cryopreservation medium disclosed by the WO patent for any somatic cells, including lymphocytes especially since the WO patent discloses that two of the most widely used cryopreservative agents, DMSO and glycerol, are damaging to thawed cells" (page 2, lines 30-31 and page 3, lines 1-2) but that the presence of arabinogalactan in the media reduces cellular damage (page 8, lines 5-11).

Appellant contends that the only data provided in the WO patent is directed to seven lines of immortalized mammalian cells and that blood cells include erythrocytes and leukocytes. Appellant also argues that the WO patent discloses better result with addition of DMSO. These arguments have not been found persuasive. Note that the reference is applicable for everything it teaches and is not limited to specific examples. Further, note that the WO patent discloses that arabinogalactan alone was used to freeze some cell types and the cell performance after freezing was either better or equivalent to a standart freezing media (page 15, last paragraph).

For the above reasons, it is believed that the rejections should be sustained.

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ELLI PESELEV
PRIMARY EXAMINER
GROUP 1800

Respectfully submitted,

Elli Peselev
November 19, 2003


Conferees
James Wilson
SPE 1623


Jim Housel
SPE 1648


SAMUEL BARTS
PRIMARY EXAMINER
GROUP 1800
Conferees

SCHWEGMAN, LUNDBERG, WOESSNER & KLUTH, P.A.
P.O. BOX 2938
MINNEAPOLIS, MN 55402